IN THE

Supreme Court of the United States

OCTOBER TERM—1946

No. 388

MARGARET BOLLINGER and
CHARLES W. BOLLINGER,
Petitioners,

against

GOTHAM GARAGE COMPANY,
Respondent.

REPLY BRIEF IN SUPPORT OF PETITION FOR A WRIT OF CERTIORARI

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Respondent's brief evades the issue presented by the petition for a writ. The primary question is not what the defendant's duty was, since the Trial Court (R. 211, 212) and Circuit Court agree that the duty is one a licensor owes a licensee, but rather, the issue is whether the facts established that the duty was violated. Petitioners contend that the Circuit Court had no right to substitute its viewpoint for the jury's on the latter proposition, and in this unauthorized and unconstitutional manner deprive petitioners of some $18,949.05 awarded for substantial pain, suffering (R. 103, 138) and medical expenses (R. 206).

Petitioners are familiar with the general rule, to which respondent devotes almost its entire brief, that there is no liability on the part of a licensor for injury sustained by those coming on its premises as mere licensees, unless there

is something on the premises in the nature of a trap, or the licensor has been guilty of active negligence, or he failed to give warning of a condition of which he knew.

Bigelow on Torts, 8th ed., pp. 160, 161.

Of course it must appear that the licensor was not guilty of active negligence or that no new danger was created by the licensor.

It is significant that nowhere does the respondent, in its brief, discuss the evidence of the garage employee taking the chain off the shaft and leaving it off (R. 118, 119). Yet this is one of the facts from which the jury could have found active negligence, and this is inherent in their verdict. More is involved here than the simple rule that a licensee takes the premises as he finds them. The premises were changed by the act of the garage employee removing the chain which protected the shaft, thus changing the premises and creating a danger in the nature of a trap.

Although denied by respondent, there was ample evidence from which the jury could infer that plaintiffs' presence in the garage was known (R. 17, 19, 25, 26, 30, 31, 63, 100, 126, 145, 210).

There being sufficient evidence from which the jury could find active negligence from the garage employee's act in taking off and leaving off the chain (R. 78, 118, 119); or from the absence of guards or warnings (R. 79); or that a trap had been created by the deceptive character of the shaft as contrasted with the garage floor (R. 32, 35, 42, 107, 108, 110, 111, 159, 161, 163, 185); the Circuit Court was not authorized under applicable New York law to make an arbitrary factual re-evaluation of the evidence and nullify the determination of a jury.

The result is the more unjust when it is considered that the jury was measuring the duty owing in terms of licensee and licensor rather than in terms of invitee and invitor.

The Court (over exception R. 220) eliminated all circumstances and conditions which might have cast upon the defendant a burden of duty from which the Court held it wholly free.

> *Warner* v. *Lucey,* 207 App. Div. 241, affd. 238 N. Y. 638;
> *Hamblet* v. *Buffalo Library Garage Co.,* 222 App. Div. 335.

Despite this advantage to the defendant, the jury found it guilty of negligence.

The New York rule that the companion of a patron is an invitee accords with the weight of authority.

> *Silvestro* v. *Walz,* 222 Ind. 163, 51 N. E. (2d) 629;
> *Palmer* v. *Boston Penny Savings Bank,* 301 Mass. 540, 17 N. E. (2d) 899, 120 A. L. R. 633.

In *Silvestro* v. *Walz* (*supra*) a customer drove his car to a defendant's garage. Between the office and the north wall was a stairway. There was no light there (*cf.* R. 19, 58, 103, 119, 148). There was no gate at the stair entrance and no signs indicating it was private or dangerous (*cf.* R. 79). "It looked like a passageway" (*cf.* R. 107, 150). Immediately south thereof was a door to the office with the word "Private" thereon (*cf.* R. 17, 63, 145). No place in the shop was specifically reserved for waiting customers. The entire ground floor of the shop was open and there were no signs (*cf.* R. 79) nor railings indicating that any portion was not to be used by persons waiting while work was being performed on their cars.

Plaintiff described the manner of his injury as follows (p. 169):

> "* * * I got out of my car and I had to go to the washroom. I walked around the car and I passed an office doorway. And then there was an areaway north of the office door and I thought probably that would be the washroom. It being dark, I stopped

for a minute, and took a step forward, and as I did, I landed at the bottom of these stairs * * *

"I got out of the car, and I was looking, there was no one there at the present time, and I was looking for a toilet and I walked around my car and I seen this areaway next to this office door and it looked like a passageway."

On cross examination he testified (p. 170):

"Q. You had never been to any toilet there before? A. No.

"Q. You didn't know there was one there? A. No."

The Court remarked (p. 170):

"If the duty here existed it cannot be doubted that the evidence was sufficient to show its breach by failure to bar, guard, properly light or otherwise warn of the danger of the open stair entrance, which, without such precaution, might become a trap to the unwary. So the controlling question upon the issue of negligence is whether or not appellee was an invitee.

"It is insisted by appellant that an implied invitation to a customer extends only to that part of the proprietor's premises necessary for the transaction of their mutual business. He persuaded the trial court to so instruct the jury. The area is not so narrowly circumscribed. A customer is invited to all parts of the premises that may reasonably be expected to be used in the transaction of the mutual business, those incidental as well as those necessary.

"Nor would it seem unreasonable to hold that the owner of the premises should anticipate what is usually and customarily done by an invitee within the scope of, and to carry out the purpose of the invitation. See Ford v. Dickinson, 280 Mo. 206, 217 S. W. 294; True v. Meredith Creamery, 72 N. H. 154, 55 Atl. 893; Loney v. Laramie Auto Co. (1927), 36 Wyo. 339, 255 P. 305, 53 A. L. R. 73, 79.

"The proprietor of any automobile repair shop may reasonably expect that his customers will not sit

or stand in one place awaiting completion of the repairs. Usually they are interested in what is being done and move about in the vicinity of the operation. Appellant could not be blind to this common practice. The place in his shop to which appellee unquestionably was invited to drive his car was only a few feet from the stairway. If between the car and the stair entrance there was to be a dividing line beyond which he was a mere licensee, the boundary should have been realistic. Barriers and signs may be seen. This was recognized by appellant for he set apart his office by partition and sign. He could have provided a space behind railings for waiting customers. But in all the shop, and particularly the vicinity of appellee's car, there was no barrier by structure or sign keeping him from any place except the office. From all these circumstances the jury might reasonably have inferred that appellant's invitation covered the space adjacent to the car including the stair adjacent. The following cases tend to support this conclusion: Howe et al v. Ohmart (1893) 7 Ind. App. 32, 33 N. E. 466; Pauckner v. Wakem (1907), 231 Ill. 276, 23 N. E. 202, 14 L. R. A. (N. S.) 1118; Pope v. Willow Garages Inc. (1931) 274 Mass. 440, 174 N. E. 727; Franey v. Union Stockyards and Transit Co. of Chicago (1908), 235 Ill. 522, 85 N. E. 750; Montague v. Hanson (1909), 38 Mont. 376, 99 P. 1063. See also Bartholomew v. Grimes (1912) 51 Ind. App. 614, 100 N. E. 12.

"We regard as irrelevant appellant's arguments that he was under no duty to furnish a toilet for his customers and that one was available in the west end of the building. If there had been one, so labeled, in view of appellant, that might have been considered upon the question of contributory negligence. But the negligence of appellant was not in his failure to furnish a toilet but in leaving unguarded an opening which might become a trap in the area to which appellee was invited. He did not step out of the role of invitee, when, responding to an urgent physical need, he entered in the belief that the areaway led to the toilet. Pauckner v. Wakem, supra."

The Court, therefore, upheld the verdict in favor of the injured party. The facts in that case conform closely to

those in the case at bar. The distinguishing feature being that petitioners here were companions of a patron, a fact which in New York would not change the result. *Warner* v. *Lucey* (*supra*).

Petitioners here were entitled to go to the jury on the question of their status. In withholding this issue from the jury the petitioners were deprived of a jury trial on that issue, contrary to the law of the State of New York and the United States Constitution.

But here petitioners were given a greater burden of proving the defendant guilty of a breach of duty than would ordinarily be required of petitioners in New York State, and convinced the jury of the breach of this duty. To set aside the verdict under such circumstances offends principle and authority.

Respondent contends that no factual issue was presented. Yet it was the respondent who introduced evidence of the lighting requirements as part of its case (R. 200-1). Its counsel previously stated (R. 190):

> "One of the important questions in this case is the question of darkness, in my humble opinion * * *."

So that, at least on one of the factual issues, it attempted to present a defense.

Respondent never moved for a directed verdict. In New York, a party failing to move for a directed verdict concedes that there is a question of fact for the jury.

> *Hirsch* v. *Schwartz & Cohn*, 256 N. Y. 7;
> *Eno* v. *Klein*, 236 N. Y. 543;
> *Colella* v. *Smith-Fredenburg Corp.*, 239 App. Div. 274, affd. 266 N. Y. 641.

Petitioners contend that Rule 50(b) of the Federal Rules of Practice does not dispense with this motion but on the contrary requires it.

Respondent admits at page 17 of its brief that this Court has not passed on the matter, expressly stating in *Berry* v. *United States,* 312 U. S. 450, 61 S. Ct. 637, 85 L. Ed. 945 that "the Circuit Court of Appeals are not in complete agreement" as to the meaning of this rule. This presents but another reason for the granting of the writ, so that the meaning of the rule may be resolved.

The case of *Middleton* v. *Whitridge,* 213 N. Y. 499, 507 cited by respondent does not hold that a directed verdict is not required in New York. Respondent has left out the sentences following the portion quoted by it. The rest of the paragraph reads:

> "The question on the merits then in this case is whether the evidence presented a question of fact for the jury. If it did not, the Appellate Division had the power on the motion to dismiss the complaint to render the judgment appealed from. If it did, the Appellate Division on reversing the judgment, should have granted a new trial."

Continuing at page 514, the Court said:

> "The question of the sufficiency of the evidence to present a question of fact must be determined on appeal by the evidence actually received, and we are of the opinion that the evidence presented a question for the jury, both as to the defendant's negligence and as to whether that negligence was the proximate cause of death. The Appellate Division, therefore, erred in dismissing the complaint."

The case of *Emerich as adm. v. N. Y. C. R. R. Co.,* 295 N. Y. 932 is inapposite. No defect or active negligence was shown hence there was no evidence presented which would establish a cause of action. We are not concerned in the case at bar with the question of whether there was any evidence, but rather whether the evidence presented may be re-evalued by an appellate court.

What purpose respondent has in mentioning that petitioners had taxied to nightclubs before the accident is diffi-

cult to understand, since the record shows that they were unable to get reservations in any of them (R. 50, 70) and returned to the Elegante where they met the patron of the garage, Mr. Pierce.

Petitioners submit that the Circuit Court acted improvidently in setting aside a jury's verdict requiring defendant to repair an injury it caused incidental to its undertaking as a public garage.

Wherefore, it is respectfully submitted that the petition for a writ of certiorari should be granted.

Respectfully submitted,

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